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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 518 October Term, 1948

ATLANTIC FREIGHT LINES, INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Superior Court of Pennsylvania may be found in this case at page 283. It is officially reported in 163 Pa. Superior Court 216; 60 A. 2d 589 (1948).

QUESTIONS PRESENTED FOR REVIEW

I.

Does petitioner's certificate from the Interstate Commerce Commission authorize transportation between Philadelphia, Pennsylvania and the Pittsburgh, Pennsylvania area, via Maryland, of shipments originating in Philadelphia and destined for the Pittsburgh area?

II.

Does the routing of property between two points in one state by way of another state necessarily make those shipments bona fide interstate commerce?

III.

Does a state have the right to determine that the transportation of freight between points in that state through another state, over an indirect route, where there is a more direct route available, is not bona fide interstate commerce but a subterfuge to avoid state regulation?

ARGUMENT

I.

Petitioner's certificate from the Interstate Commerce Commission does not authorize transportation between Philadelphia, Pennsylvania, and the Pittsburgh, Pennsylvania, area, via Maryland, of shipments originating in Philadelphia and destined for the Pittsburgh area.

There is no merit to the contention of petitioner that the Interstate Commerce Commission actually made a finding as to the bona fideness of the operation complained of and that the certificate actually authorized transportation between Philadelphia, Pennsylvania and McKeesport, Pennsylvania of shipments intrastate in character.

On this issue petitioner contends that the certificate of public convenience and necessity issued to it under Section 206(a) of the Federal Motor Carrier Act (49 U. S. C. A. 306 (a)) was conclusive. This section known as the Grandfather Clause reads as follows:

> "* * * Provided, however, that if any such carrier or predecessor in interest was in *bona fide operation* as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the

territory for which application is made and has so operated since that time * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by said operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, * * *" (Emphasis ours)

A reference to the report and order and the certificate issued by the Interstate Commerce Commission as appears in the record beginning at Page 202(a) reveals that the position of the petitioner cannot be sustained. Nowhere in the report and order of the Interstate Commerce Commission or in the certificate issued subsequent thereto is there any finding that the type of operation complained against was ever in issue before the Interstate Commerce Commission. There is no evidence that any shipments originating in Pennsylvania for destination to another point in Pennsylvania were brought to the attention of the Interstate Commerce Commission for adjudication as to whether such shipments were bona fide interstate commerce. The report and order of the Interstate Commerce Commission set forth beginning at page 202(a) of the record refers to three prior reports and orders reported in the Interstate Commerce Commission Reports at 41 M. C. C. 654, 43 M. C. C. 866 and 43 M. C. C. 866. In each of these reports placed in the record by the petitioner the question of whether transportation be-

tween points in Pennsylvania was bona fide was not in issue as apparently there were no such shipments transported by petitioner until recently. Thus, the issue as to whether transportation between points in Pennsylvania was bona fide interstate commerce was never before the Interstate Commerce Commission at any time, and of course there could never have been a finding that such transportation was bona fide.

Judge Hirt in speaking for the Superior Court of Pennsylvania in *Atlantic Freight Lines v. Pennsylvania Public Utility Commission,* 163 Pa. Superior Court 216, 60 A. 2d, 589 (1948), says at pages 220, 221 and 222 of 163 Pa. Superior (Record, pages 286, 287):

> "The route as approved by the Interstate Commerce Commission upon which appellant relies, is this described in the certificate of public convenience and necessity issued to it by that commission:
>
> 'Between Pittsburgh, Pa. and Newark, N. J. From Pittsburgh over Pennsylvania Highway 51 to Uniontown, Pa., thence over U. S. Highway 40 to Baltimore, Md., and thence over U. S. Highway 1 to Newark, and return over the same route. Service is authorized to and from the intermediate points of Uniontown and Philadelphia, Pa., Baltimore, Md., Trenton, N. J., those in Pennsylvania within 20 miles of Pittsburgh, and those within 25 miles of New York, N. Y.; and the off-route points of East Riverton, N. J., and those in Pennsylvania within 20 miles of Pittsburgh.'

"It seems reasonably clear from the above language of the certificate that what was authorized by the commission was interstate transportation over stated highways from Pittsburgh to Baltimore, Maryland, to Newark, New Jersey, and return, and that common carrier service was permitted between certain intermediate points of origin in one state and of destination in another. Clarification of the order, indicating that intent, is to be found in the Report and Order of the Interstate Commerce Commission in the proceeding in which appellant's interstate rights were adjudicated. It was there recognized that Atlantic was entitled to 'grandfather' rights acquired from a predecessor. Appellant was entitled to the benefit of the proviso of § 206 of the Motor Carriers Act, 49 U. S. C. A. 306(a), relating to 'grandfather' rights, only to the extent of actual and bona fide operations in interstate commerce on or before June 1, 1935. Loving et al. v. United States, 32 F. Supp. 464. The Interstate Commerce Commission, on the evidence before it, found that the prior shipments in the 'grandfather' service were 'between Baltimore, on the one hand, and, on the other, points in West Virginia and western Pennsylvania, including the Pittsburgh area, and between New York, N. Y., and certain northern New Jersey points, on the one hand, and the Pittsburgh area, on the other.' There is no reference in the report to any evidence of shipments between Philadelphia and the Pittsburgh area from which

'grandfather' or any other rights to transportation between these two points could be inferred. The Interstate Commerce Commission approved transportation from and to the Pittsburgh area along an interstate route which included Philadelphia but only as to shipments between states. It did not authorize by implication or otherwise the transportation of goods, between points of both origin and delivery within Pennsylvania, though over Maryland highways."

II.

The routing of shipments of property between two points in one state by way of another state does not necessarily make those shipments bona fide interstate commerce.

There are certain basic principles regarding a state's right to regulate intrastate commerce which we think the petitioner will not dispute.

The first of these is that a state may require an intrastate certificate of an interstate carrier who is doing intrastate business. That principle is contained in *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268, 273, 83 L. Ed. 641, 59 S. Ct. 532, (1939), rehearing denied in 306 U. S. 662, 669, 83 L. Ed. 1063 where the Court said:

> "Third, Appellant did not seek from the state commission a certificate entitling him to do an intrastate business. Under the Commission's rule, he had his choice either to refrain from carrying property between points in Missouri or to secure a certificate of public convenience and necessity as an intrastate carrier. The validity of the requirement of such a certificate to promote the proper and safe use of the state highways is not open to question. Hendrick v. Maryland, 235 U. S. 610, 622; Morris v. Duby, 274 U. S. 135, 143;

Clark v. Poor, 274 U. S. 554, 556, 557; South Carolina Highway Dept. v. Barnwell Brothers, 303 U. S. 177, 189; Compare Buck v. Kuykendall, 267 U. S. 307, 315; Interstate Busses Corp. v. Holyoke Ry. Co., 273 U. S. 45, 51; Sprout v. South Bend, 277 U. S. 163, 169."

Thus if the petitioner had interstate rights between Philadelphia and Pittsburgh over a route entirely within the state, it could hardly be argued that it did not require a certificate to engage in intrastate carriage over the same route, i. e., the transportation of property from a point of origin in Philadelphia to its final destination in Pittsburgh. The converse is also true; the Pennsylvania Commission could not require a showing of public necessity in order that a carrier might carry interstate shipments over the same route, i. e., the transportation of property between Philadelphia and Pittsburgh, the origin or final destination of which is a point outside the state of Pennsylvania.

The same principles apply if a carrier has an interstate route covering more than one state. For example, this appellant would be an interstate operator if his route went from Newark, New Jersey, to Philadelphia and thence to Pittsburgh, the Philadelphia-Pittsburgh portion being entirely within this state. But no court would deny this state the right to require a certificate of public convenience to transport property from Philadelphia to a final destination in Pittsburgh. And conversely, no court would give this state the right to require a showing of public necessity to

transport property from Philadelphia to Pittsburgh if the final destination was to be a point in some other state.

Therefore, our immediate problem is to discover what is true interstate commerce. The *route* is not the controlling factor. We admit that the route is an interstate one, but an interstate route does *not* give the right to carry *intrastate shipments* on it. The Interstate Commerce Commission has itself said that the determination of the character of a shipment depends upon the *intention* of the shipper. Did the shipper intend that the property moving between points in the same state should become part of the flow of interstate commerce? In this case the uncontradicted facts show an intention to originate the shipment in Philadelphia and end it in the Pittsburgh area. The Interstate Commerce Commission *In re Crude Talc, California Mines to Dunn, California,* No. MCC-380, 5 Federal Carriers cases (Par.) 30, 995, released October 9, 1945, says:

> "It is well established that in determining whether a particular movement of freight is in intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment, providing the intention persists throughout the movement. Rush Common Carrier Application, 17 M.C.C. 661, 1 Federal Carriers Cases (Par.) 7378, and cases there referred to."

Thus the route followed, whether it merely dips into another state for a mile or two or whether it en-

compasses all forty-eight states, cannot change the intrastate character of the shipment where the normal logical route lies entirely within the boundaries of one state.

There seems to be a great deal of confusion between a determination of the character of the route and the character of the shipment in question. We do not question that a certain route may in fact be interstate, but that fact does not make all shipments over it bona fide interstate commerce, and cannot deprive a state of its right to regulate. Petitioner relies strongly on The Federal Motor Carrier Act of August 9, 1935, (49 U.S.C.A. Sec. 303 (a) (10)):

> "§303. Definitions and exceptions.
>
> (a) Definitions. As used in this chapter—
>
> * * *
>
> (10) The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

The preceding section of the same Act (49 U.S.C.A. Sec. 302(b)) expressly disavows any jurisdiction over intrastate commerce:

> "§302. Application of provisions
>
> * * *
>
> (b) Nothing in this chapter shall be construed to affect the powers of taxation of the sev-

eral states or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Both the Superior Court of Pennsylvania and this Honorable Court have held that the mere routing of shipments between two points in one state by way of another state does not take away a state's rights to protect its intrastate interests. *Eichholz v. Public Service Commission of Missouri,* 306 U. S. 268 (1939); *Ryan et al. v. Pennsylvania Public Utility Commission,* 143 Pa. Superior Ct. 517, 17 A. 2d 637 (1941). We contend that the court decisions have limited the scope of the definition of "interstate commerce", cited above, so that it does not apply to situations where the intention of the shipper is to accomplish the transportation of property from one point to another in the same state.

III.

A state has the right to determine that the Transportation of freight between points in that state through another state, over an indirect route, where there is a more direct route available, is not bona fide interstate commerce but a subterfuge to avoid state regulation.

Petitioner contends that the Commonwealth of Pennsylvania is precluded from determining whether its transportation for compensation of sugar from Philadelphia, Pennsylvania to McKeesport, Pennsylvania, via Maryland, is not bona fide interstate commerce but a subterfuge to avoid state regulation. Petitioner in support of its contention relies upon a certificate of public convenience issued to it by the Interstate Commerce Commission under authority of the Grandfather Clause of the Federal Motor Carrier Act, supra.

We respectfully submit that the contentions of the defendant are not supported by the judicial pronouncements of the courts. In *Grubb v. Public Utilities Commission of Ohio et al.*, 281 U. S. 470 (1930), it was held that state and federal courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, including the Commerce Clause, save in exceptional instances where jurisdiction has been restricted by Congress to the

federal courts. This raises the question of whether the Federal Motor Carrier Act has so occupied the field as to prohibit a state commission or a state court from determining that commerce between two points in the same state via another state, the transportation of which on a normal routing would be entirely within that state, is subject to state regulation.

Prior to the passage of the Federal Motor Carrier Act, it was held in *Inter-City Coach Co. v. Atwood, et al.,* 21 Federal (2d) 83 (1927), that to constitute "interstate commerce" by a bus line, it was not sufficient that its busses cross a state line but that they must transport passengers or goods interstate or be intended in good faith to do so. The Court said on page 85:

> "* * * In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide. The question whether it is so is open to inquiry.
>
> "Freedom of commercial intercourse between the states, as the Supreme Court has repeatedly held, is of such paramount importance that interference with it by the states cannot be permitted; and the powers of the states have been restricted accordingly. Western Union Tel. Co. vs. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355. *But the commerce thus protected is real commerce. It has never been held, and we believe never intended, that a mere fiction of interstate commerce may be so availed of as to deprive a state of its power to enforce sound regulation of the use of its highways*

in intrastate commerce. Interstate Busses v. Holyoke Street R. Co., 273 U. S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530." (Appeal refused by Supreme Court, 278 U. S. 663). (Emphasis ours)

The Superior Court of Pennsylvania in passing upon a factual situation similar with the instant case, and similar to *Inter-City Coach Company v. Atwood,* supra, quoted the above language in *Blackmore et al. v. Public Service Commission,* 120 Pa. Superior Court 437 (1936), and said further on page 448:

"* * * As we have indicated the question of subterfuge is one of fact to be determined by the commission; * * *"

We submit that under the law, prior to the passage of the Federal Motor Carrier Act, it was an established principle that a state could determine whether or not a motor carrier was engaged in bona fide interstate transportation or was operating as a subterfuge.

A review of the Federal Motor Carrier Act (49 U.S.C.A. 301 et seq.) does not reveal an intention of Congress to exclude the authority of states to pass upon the question as to whether or not an operation is bona fide interstate commerce or a subterfuge. Section 302, Title 49 U.S.C.A. contains a "Declaration of policy and delegation of jurisdiction to the Interstate Commerce Commission." By subdivision (a) of said section, it is the expressed purpose of the Congress to "cooperate with the several states and the duly authorized officials thereof * * * in the administration and

enforcement of this chapter." And then by subdivision (b):

> "Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof. (Feb. 4, 1887, C. 104, Part II, 202, as added Aug. 9, 1935, C. 498, 49 Stat. 543.)"

This section clearly shows that Congress intended to leave with each State the exclusive right to regulate and control intrastate commerce by motor carriers on the highways of such states. This exclusive right could not be exercised properly if a State had no power to determine that an operation between points in that State, through another State, was not bona fide interstate commerce.

The petitioner has attempted to cloak itself with the phrase, "bona fide interstate commerce", as found in 49 U.S.C.A. Section 306, the Grandfather Section of the Federal Motor Carrier Act, under which a certificate of public convenience was granted to Atlantic Freight Lines, Inc. However, the phrase "bona fide" is not a safe haven for this operator which is operating on the highways of the Commonwealth of Pennsylvania in outright defiance of its laws. In *McDonald v. Thompson et al.*, 305 U. S. 264 (1938), a suit was brought against the members of the Texas Railroad

Commission, seeking to enjoin that Commission from enforcing a Texas statute which required every carrier of property by motor vehicle over Texas highways to obtain from the Railroad Commission a certificate of convenience and necessity. The plaintiff contended that it had been in bona fide operation in interstate commerce on Texas highways at the time the Federal Motor Carrier Act was passed and insisted that notwithstanding state law he was entitled to continue operations under the Grandfather Clause. The plaintiff had been denied a certificate by the Texas Commission and the Court stated that the operation had been without authority of the Texas Commission and, unless within the proviso of the Federal Act, without authority of federal law, and stated further on page 266 as follows:

> "Exact definition of 'bona fide operation' is not necessary. As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms. Piedmont and Northern Ry. Co. v. Interstate Commerce Comm'n., 286 U. S. 299, 311. *To limit the meaning to mere physical operation would be to eliminate 'bona fide'.* That would be contrary to the rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent. Ginsberg and Sons v. Popkin, 285 U. S. 204, 208. Ex Parte Public National Bank, 278 U. S. 101, 104. There is noth-

ing to justify rejection of these qualifying words. The expression 'in bona fide operation,' suggests absence of evasion, excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service *and in context implies recognition of the power of the state to withhold or condition the use of its highways in the business of transportation for hire. Plainly the provision does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.*

"As petitioner is not protected in his operations as a common carrier by the proviso, we need not consider to what extent, if at all, the Federal Motor Carrier Act superseded the state Motor Truck Law, or any other question presented by petitioner." (Emphasis ours)

Section 2, paragraph 6 of the Public Utility Law of Pennsylvania (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1102, paragraph 6) defines a "common carrier by motor vehicle" as follows:

" 'Common Carrier by Motor Vehicle' means any common carrier who or which holds out or undertakes the transportation of passengers or property, or both, or any class of passengers or property, between points within the Commonwealth by motor vehicle for compensation, * * *"

It is to be noted that under this section of the law, any transportation of passengers or property between

points within this Commonwealth for compensation becomes a public utility under Section 2 paragraph 17(c) of the Public Utility Law of Pennsylvania, (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1102, paragraph 17(c)) which reads:

> "'Public Utility' means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:
>
> * * *
>
> (c) Transporting passengers or property as a common carrier."

Section 201 of the Public Utility Law of Pennsylvania (Act of May 28, 1937, P. L. 1053, 66 Purdon's Pennsylvania Statutes Annotated, Section 1121) requires the common carrier to obtain a certificate of public convenience to conduct the operation.

There can be no question that the shipment of freight in the instant case was between points in the Commonwealth of Pennsylvania and for the petitioner to conduct this type of business without a certificate of public convenience from the Pennsylvania Public Utility Commission constitutes an operation on the highways of Pennsylvania in defiance of its laws.

The issuance of a certificate to Atlantic Freight Lines, Inc. by the Interstate Commerce Commission does not preclude Pennsylvania from determining whether Atlantic's operation constitutes a subterfuge to evade regulation. It is respectfully submitted that

Pennsylvania is not powerless to protect its intrastate commerce.

Your Honorable Court in *Eichholz v. Public Service Commission of Missouri*, supra, held that even though the Interstate Commerce Commission had taken provisional jurisdiction of the transportation involved, namely between points in the same State via another State, that nevertheless, the State Commission had authority to find from the facts that such operations were a subterfuge and to enjoin such transportation.

The Superior Court of Pennsylvania in *Ryan et al. v. Pennsylvania Public Utility Commission*, supra, considered the effect of the Grandfather Clause of the Federal Motor Carrier Act upon the jurisdiction of the Pennsylvania Public Utility Commission and stated as follows on page 526 of 143 Pa. Superior:

> "The Federal Motor Carrier Act of August 9, 1935, (49 U.S.C.A. Sec. 302c) expressly recognized the right of the several states to regulate intrastate carriage. The Supreme Court of the United States in the Eichholz case, supra, which involved a situation substantially analogous to the present case, *very definitely stated that a state Commission has jurisdiction to determine the question whether carrying merchandise across state lines is bona fide or a mere subterfuge to evade the state Commission's jurisdiction.* It ruled, p. 273, that mere pendency before the Interstate Commerce Commission of an application by a motor carrier

to operate under the Federal Motor Carrier Act in interstate commerce did not supersede the authority of the state body to take appropriate action under the State law to enforce reasonable regulations of traffic on the state highways. Mr. Chief Justice Hughes said, p. 274:

> 'If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transactions * * * was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint' ". (Emphasis ours)

An appeal to the Supreme Court of Pennsylvania was refused in the *Ryan* case and Certiorari to the Supreme Court of the United States was denied at 314 U. S. 640 (1941).

The instant case is even stronger than either the *Eichholz* or *Ryan* cases, supra, since it is clear from the certificate that was granted petitioner by the Interstate Commerce Commission that it did not authorize by implication or otherwise the transportation of goods, between points of both origin and delivery within Pennsylvania, though over Maryland Highways. An obvious example of the meaning of an Interstate Commerce Commission certificate would be one granting the right to transport property between Harrisburg and Pittsburgh over Pennsylvania highways.

Certainly the implication is that such authority covers only shipments in interstate commerce, i. e., shipments coming from or destined for another state.

Thus under all the law and facts in this case, we respectfully contend that the Commonwealth of Pennsylvania was not precluded from determining that said operation did not constitute bona fide interstate commerce but was a subterfuge and in violation of the laws of the Commonwealth.

Respondent vehemently denies the statement made by petitioner on page 19 of its brief that respondent has delayed the argument on petitioner's petition filed with the Interstate Commerce Commission under Section V, Sub-section D of the Administrative Procedure Act of 1946 (June 11, 1946, C. 324 §5 60 Stat. 239; 5 U.S.C.A. §1004) praying for a construction of its certificate of public convenience and necessity. Respondent upon receipt of a copy of said petition did immediately file an answer thereto with the Interstate Commerce Commission. The procedural control of the proceedings rests entirely with the Interstate Commerce Commission and as yet to our knowledge the matter has never been set for hearing or argument. Furthermore petitioner has raised a matter which is not a part of the record in the case presented for consideration by your Honorable Court.

CONCLUSION

Under the law and the facts, we respectfully urge your Honorable Court to deny the prayer of the petition for Writ of Certiorari.

Respectfully submitted,

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